IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TONY KOLE and GHOST INDUSTRIES, LLC, an Illinois limited liability company,	)	
Plaintiffs,	)	
	)	Case No. 11 CV 3871
v.	)	
VILLAGE OF NORRIDGE, an Illinois municipal corporation,	)	
Defendant.	)	

PLAINTIFFS' REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

NOW COME the Plaintiffs, TONY KOLE and GHOST INDUSTRIES, LLC, an Illinois limited liability company, by and through undersigned counsel, and for their Reply to Defendant's Response to Plaintiffs' F.R.Civ.P. 56(a) Motion for Summary Judgment, state the following:

INTRODUCTION

Plaintiffs have, in their Response to Defendant's Motion for Summary Judgment, already responded to many of the arguments Defendant makes in its Response. Plaintiffs therefore incorporate those previous arguments as part of its Reply. *See* Plaintiffs' Resp., Dkt. # 226, at 3-44; *see also* Plaintiffs' Memorandum in Support of Motion for Summary Judgment, Dkt. # 206, at 3-28.

Plaintiffs additionally reiterate the following:

The Defendant is attempting to frame the Second Amendment issue in this case as being solely about "sensitive places," but that has never really been what this case is about. Nor is this case about legitimate "public safety" concerns, and certainly no measures that were actually tailored towards any such concerns,

In the end, this case is about how Defendant simply did not want a gun store within its municipal limits. Plaintiffs were subjected to highly restrictive conditions for opening, with their licensing threatened for failure to comply, plus a series of Ordinances that eliminated their business license, then allowed them to operate but allowed them nowhere to go. These events eventually caused Plaintiffs to go out of business.

By these actions, Defendants violated the Plaintiffs' Second Amendment right to sell firearms, their First Amendment right to advertise its business *via* exterior signage, and the dormant commerce clause. Therefore, summary judgment should be granted, and eventually-proven damages awarded, in Plaintiffs' favor.

ARGUMENT[1]

I. PLAINTIFFS ARE NO LONGER SEEKING INJUNCTIVE RELIEF, BUT THEIR CLAIMS FOR DAMAGES ARE NOT MOOT.

Plaintiffs acknowledge they are not seeking injunctive relief at this time, since Defendants repealed the 2011 Revised Ordinance and the 2013 New Ordinance, and since the Agreement seems to have expired/will expire, and that Plaintiffs have not been able to search for a location since the passage of the 2014

[1] Plaintiffs incorporate their Undisputed Statement of Facts (Dkt. #197) and their Summary Judgment Exhibits 1-27 (Dkt. ## 198 - 201-1) herein.

Ordinance. However, Defendant does not get it both ways. If Plaintiffs injunctive relief claims are moot, they should be dismissed as moot, with the implied leave to reallege those claims if they somehow become relevant. Admittedly, that would not happen with the 2011 or 2013 Ordinances, but it may with the other issues. Defendant is not, however, entitled to judgment as if it won those issues on the merits. They did not and should not, especially since the constitutionality of these laws/restrictions form the basis of Plaintiffs' still-pending damages claim. *See Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795, 798 (7th Cir. 2016) ("Once the ordinances were repealed, the plaintiffs dropped their requests for injunctive relief but continued to pursue damages. The latter request saves the case from mootness.").

II. PLAINTIFFS HAVE STANDING TO PURSUE THEIR AS-APPLIED CLAIM FOR DAMAGES.

Plaintiffs have legal standing to challenge the Agreement, 2011 Revised Ordinance, and the 2013 New Ordinance, for damages caused by the unconstitutional restrictions Defendant placed upon Plaintiffs in their efforts to open a firearms store in the Village.

"Article III standing 'requires the litigant to prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision.'" *Six Star Holdings,* 821 F.3d at 801 (quoting *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Despite Defendant's protestations, *all* of Plaintiffs' injuries are directly traceable to the Village, and while it has been held that damages will be submitted at an appropriate time after the liability issues are determined, it is completely false for Defendant to argue that Plaintiffs have not submitted evidence or argument about the constitutionality of the Agreement, 2011 Revised Ordinance, or the 2013 New Ordinance.

The Agreement

Plaintiffs submitted evidence that Defendant first refused to allow the ATF to do a required premises inspection unless Plaintiffs agreed to the "Agreement" (Exh. 8), and that without the inspection, Plaintiffs would not obtain the required Federal Firearms License (FFL) (SUF 9). Plus, that Plaintiffs were already paying rent on the Montrose space (SUF 8).

Plaintiffs have asserted that the Agreement was so restrictive that Plaintiffs only signed it under duress. Though Defendant claims that Plaintiffs' problems with the Agreement are self-inflicted, the facts show that is not the case.

"'The 'unconstitutional conditions' doctrine is premised on the notion that what a government cannot compel, it should not be able to coerce.' *Libertarian Party of Ind. v. Packard*, 741 F.2d 981, 988 (7th Cir. 1984). Understood at its most basic level, the doctrine aims to prevent the government from achieving indirectly what the Constitution prevents it from achieving directly. Thus, '[t]he denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly.' *Elrod v. Burns*, 427 U.S. 347, 361, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) (plurality opinion)."

Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health, 699 F.3d 962, 986 (7th Cir. 2012). *See also Kole v. Village of Norridge*, 941 F. Supp. 2d 933, 945-46 (N.D.Ill. 2013). And just as "the constitutional right to obtain an abortion is a right against coercive governmental burdens" *Planned Parenthood*, 699 F.3d at 987, so too is the Second Amendment right to sell and purchase firearms for self-defense.

When Defendant held up Plaintiffs' FFL inspection and certification process until they signed the Agreement, that displayed a level of coercion that fits the unconstitutional conditions doctrine perfectly. Defendant says the landlord required the same things, but the Montrose landlord was willing to let Plaintiffs do a build-out to have a retail space (*See* Exh. 15 at pp.52-54). Further, the lease allowed exterior signage with the landlord's permission (*See* Def's Exh. 5 at p.2). This shows that the conditions were not self-imposed because of the Lease, but only because the Defendant forced Plaintiffs' hand.

Further, six to twelve months after opening, Plaintiffs realized they needed a retail space. In most businesses, changing a business model is simply a matter of finances, equipment and product. However, when Plaintiffs wished to do so, they were bound by the Agreement they were forced to sign. Summary judgment in Plaintiffs' favor on this issue is appropriate.

The 2011 Revised Ordinance

Defendant knows Plaintiffs were forced to go to Court to seek an injunction to prevent the application of the 2011 Revised Ordinance from unconstitutionally shutting them down. The 2011 Revised Ordinance also stunted Plaintiffs' business growth, as it is hard to grow a business when you do not know if your type of business is about to be banned. This was discussed more fully in Plaintiffs' other summary judgment filings.

Defendant claims the 2011 Revised Ordinance was not a ban, but an ending of the licensing requirements until the 2013 Ordinance was adopted. That is false for two reasons: (1.) eliminating the category of weapons dealers from permitted businesses can *only* be considered a ban; (2.) the 2013 New Ordinance was only passed when the Court was about to rule on the constitutionality of the 2011 Revised Ordinance, and had already issued a restraining Order against it.

The 2013 New Ordinance

The 2013 New Ordinance (Exh. 11) restricted gun stores to one corner of one intersection in the entire Village (SUF 23, 24). Kole testified about the Plaintiffs' multiple efforts to both find a conforming space at that intersection, and to find possible non-conforming spaces in the Village that may have nonetheless been met with approval. As the Court knows, neither of those extremely limited options panned out, but not for lack of trying.

Eventually, Plaintiffs went out of business as a direct result of not being able to find a retail location within the narrow parameters allowed by the Defendant. Plaintiff has shown the unconstitutional nature of the 2013 New Ordinance, and the existence of damages, even if the time is not ripe in this litigation to show them exactly. Plaintiffs have standing to challenge the application of the 2013 New Ordinance.

III. THE AGREEMENT AND CHALLENGED ORDINANCES WERE NOT LAWFUL COMMERCIAL REGULATIONS OF FIREARMS SALES.

"If 'the right of the people to keep and bear arms' is to have any force, the people must have a right to acquire the very firearms they are entitled to keep and to bear. . . ." *Teixeira v. Cnty. of Alameda*, 822 F.3d 1047, 1055 (9th Cir. 2016). The *Teixeira* Court correctly noted that "[o]ne cannot truly enjoy a constitutionally protected right when the State is permitted to snuff out the means by which he exercises it." *Id.* at 1055 (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (striking down restriction on distributing contraceptives because it "impose[d] a significant burden on the right to use contraceptives"); and *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983) (holding unconstitutional a differential tax on paper and ink products consumed by publishers because it burdened rights protected by the First Amendment)).

Further, *Heller* requires that a restriction on Second Amendment rights be "long-standing." But *Heller*'s reference to "longstanding . . . laws imposing conditions and qualifications on the commercial sale of firearms" is not an all-encompassing exception that swallows the rule that *Heller* was simultaneously announcing. *See District of Columbia v. Heller*, 128 S.Ct. 2783 (2008).

The original 1972 Weapons Dealer Ordinance (Def's Exh. 9) makes no mention of distance restrictions or sensitive places. The 2011 Revised Ordinance eliminated Weapons Dealers completely. It was only after Plaintiffs moved for (and received, in part) an injunction against the application of the 2011 Revised Ordinance that the Defendant passed the 2013 New Ordinance. Defendant is trying to make their actions and this case about "sensitive places," but for most of the time this litigation has been pending that issue did not even exist.

In fact, the "sensitive places" argument so touted by Defendant has been in place only since 2013. The Constitution requires that there be "persuasive historical evidence" as to whether the challenged law falls within a "well-defined and narrowly limited" category of prohibitions "that have been historically unprotected." *See Brown v. Entm't Merchants Ass'n*, 131 S.Ct. 2729, 2733 (2011). Defendant offers a history on the public carrying of firearms, but that is irrelevant to the issue before this Court.

In fact, zoning laws of any sort, let alone zoning laws restricting the location of firearms dealers, did not even exist in America before 1900. *Teixeira*, 822 F.3d at 1058 (citing the Supreme Court's statement in *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926), that zoning laws "began in this country about 25 years ago"). Further, New York's first-in-the-nation municipal zoning ordinance dates only to 1916. Amanda Erickson, *The Birth of Zoning Codes: A History*, The Atlantic (June 19, 2012), available at http://www.theatlanticcities.com/politics/2012/06/birth-zoning-codes-history/2275/ (last visited October 7, 2016).

In short, there is no definition of "long-standing" under which this qualifies.

And Plaintiffs reiterate that the 2013 New Ordinance still left Plaintiffs nowhere to open their store. Concern about sensitive areas may in fact be a valid governmental interest, but the distance and zoning restrictions still must be substantially related to that interest. Effectively banning gun stores does not comply with constitutional precedent. And Defendants themselves rapidly reevaluated that principle when, in 2014, it halved the distance requirement and increased the available zones for weapon dealers to locate. And while Plaintiffs were willing to chalk the inability to find a location after the 2014 Ordinance to the real estate market (to the extent it was not to Plaintiffs' finances eventually drying up, at least), that was not the case with the 2013 New Ordinance, as the evidence shows.

Additionally, Defendant wrote for many pages about the history of bearing arms in public, something much discussed in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012)*,* where the Court ultimately ruled that a ban on carrying arms in public violated a fundamental Second Amendment right. The takeaway from that discussion is that bans on gun stores, explicit and effectual, are unconstitutional.

But Defendant somehow concludes that restrictions on gun stores in sensitive places are outside of the Second Amendment, because there have been restrictions on where people could carry firearms. But Section 66/65 of the Firearms Concealed Carry Act (430 ILCS 66/65) contains many restrictions on where arms can be carried in Illinois, and that does not take the right to the public carrying of arms outside the scope of the Second Amendment.

Plaintiffs do not contest that regulation of the commercial sales of firearms *can* be constitutional. But Defendant is completely wrong for arguing that those regulations mean that the subject of the regulation must be outside of the scope of the Second Amendment. If that is all it takes, governmental entities could pass any kind of firearm law and then use the law as a self-fulfilling basis to remove the issue from the Second Amendment. Besides the logical fallibility, this is why the regulation at issue has to be long-standing. Firearms sales and purchases are constitutionally protected. That lawful conditions may be placed on that right does not remove its status as a right. Defendant may label the right to sell and purchase firearms as being on "the margins of Plaintiffs' self-defense right" (Dkt. #225 at p.16), but *Illinois Retailers* and the case law say the right is much more central to the core of the Second Amendment right.

In short, the right at stake is the right to sell and purchase firearms in a commercial establishment – it is *not* the right to sell and purchase firearms at a school, park, or house of worship, and Plaintiff is not so arguing. Further, the "assault weapon" ban in *Friedman v. City of Highland Park, Illinois*, 784 F.3d 406, 410 (7th Cir. 2015), cited by Defendant, has nothing to do with this case. Defendant's attempt to conflate these issues should not be rewarded.

IV. THE AGREEMENT AND THE 2011 WEAPONS DEALER ORDINANCE VIOLATED PLAINTIFFS' FIRST, SECOND, AND FOURTEENTH AMENDMENT RIGHTS.

Under the 2011 Ordinance version of Sec. 22-362, all weapons dealers were banned in the Village as of April 30, 2013. Plaintiffs were to be forced out of business as of that date, and would have been had it not for Plaintiffs prosecuting this litigation.

Though Defendant no longer seems to be disputing the basic legal point of a Second Amendment right to sell or purchase a firearm, Defendant's 2011 gun store ban unquestionably violated the constitutional guarantees of purchasing arms for self-defense and lawful purposes, as did the other parts of the 2011 Ordinance and Agreement that, regardless of their validity as generally applied, undeniably frustrated constitutionally-secured activity.

Plaintiffs reiterate that should the Court employ means-ends scrutiny in its analysis, *Ezell* mandates that either strict scrutiny or near-strict scrutiny be employed, as "a severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government's means and its end." *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011).

Defendant argues this matter should be analyzed using intermediate scrutiny, and cites to *United States v. Williams*, 616 F.3d 685 (7th Cir, 2010). But *Williams* involved the constitutionality of the felon-in-possession statute (18 U.S.C. § 922(g)(1)), and specifically stated it was not deciding that intermediate scrutiny was the correct standard for all Second Amendment challenges. *Id.* at 692.

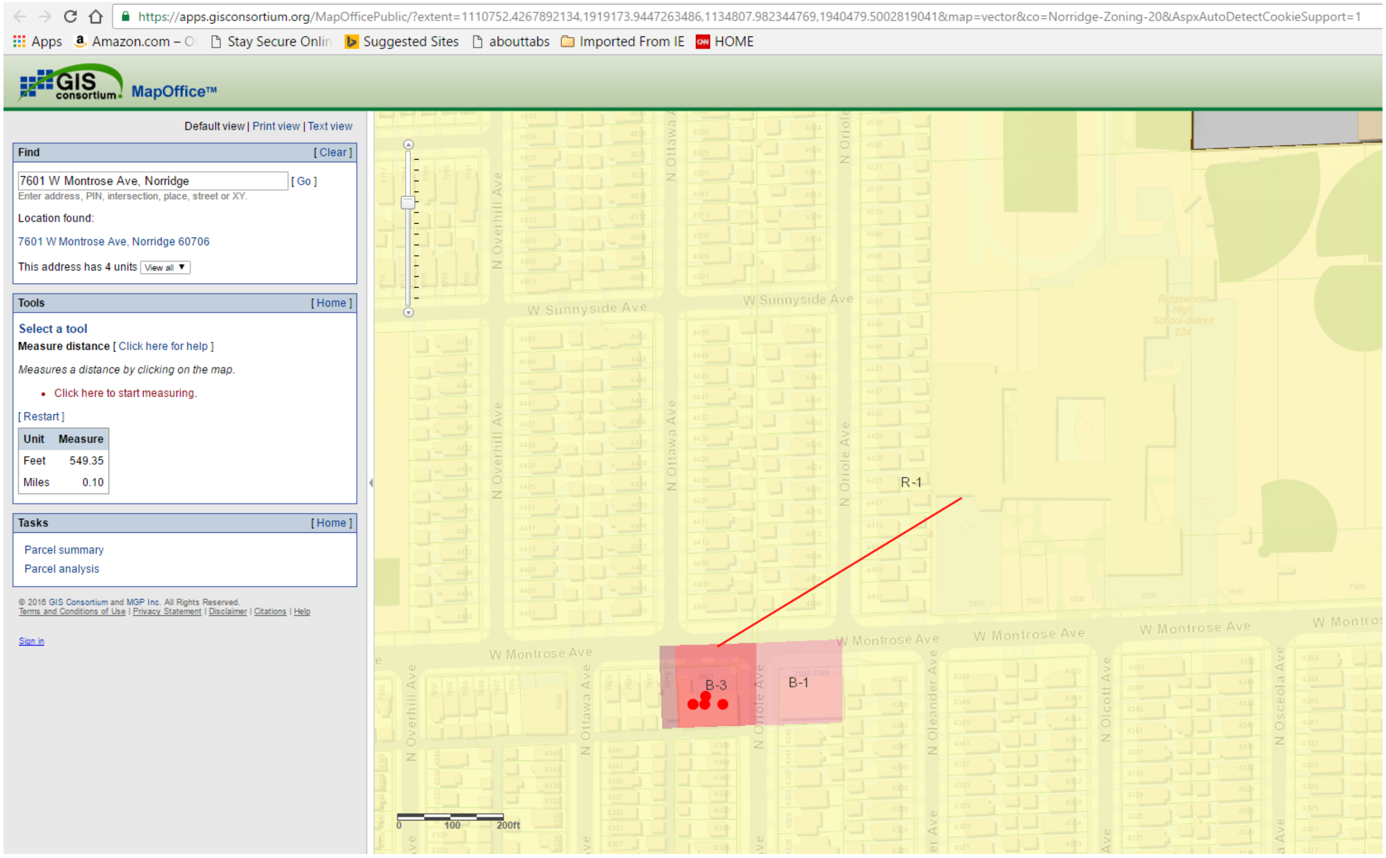
Also, the Court in *Williams* even applied intermediate scrutiny to a felon, while Plaintiffs are suing over a lawful, constitutionally-protected business. Further, Defendant has not met "the burden of demonstrating that its objective is an important one and that its objective is advanced by means substantially related to that objective." *Id.* at 693. And while the Defendant can probably assert an important objective (leaving aside whether that was the true motive), the heavy-handed methods employed by Defendant were not substantially related to it.

In 2011, Norridge instituted a total ban on gun stores, a complete deprivation of Plaintiffs' Second Amendment rights, with only a small grace period and the clock ticking. The only recourse Plaintiffs had was litigation. The Defendant ultimately undid the restrictions in a number of stages, but only after the Court each time informed the Defendant that the figurative writing was on the wall. Unfortunately, these changes came about too slowly for Plaintiffs, who went out of business in the interim. Defendant may so far have won the war of attrition, but this Court should not allow Defendant to escape accountability for its unlawful actions. Plaintiffs should be awarded summary judgment, and be allowed to proceed to prove their damages.

V. NORRIDGE'S 2013 WEAPONS DEALER ORDINANCE VIOLATED PLAINTIFFS' SECOND AND FOURTEENTH AMENDMENT RIGHTS.

Like the literal gun store ban of 2011, the functional ban on firearms stores imposed by the 2013 Ordinance also violated Plaintiffs' Second Amendment rights.

Once again, the Court cannot take Defendant's claim about merely trying to regulate "sensitive places" at face value. The original 1972 Ordinance which was in effect when Plaintiffs first opened mentioned nothing about location restrictions or sensitive places. The 2011 Revised Ordinance did not mention sensitive places, but ultimately was to ban weapons dealers entirely. The 2013 Ordinance did have a 1000 foot restriction from "sensitive areas," but that was reduced to 500 feet in Section 22-362 of the 2014 Ordinance (Def's Exh. 12). That would have made the B-2 zoned Maggio location valid, and even the Montrose Allstate office (*see* below diagram, showing 549 distance from Montrose office to Ridgewood High School), would have been allowed had the Defendant not forced Plaintiffs out of business first.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Location found:
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The Defendant's concern has been first and foremost getting rid of Plaintiffs, and the secondary motivation has been not suffering adverse rulings in this litigation. For all the pronouncements and space devoted to "sensitive places," the Defendant halved the restricted distance, and tripled the number of permissible zones, immediately after the 2014 Preliminary Injunction hearing.[2]

Defendant had to not only carry the burden to justify its regulations, but the Defendant had to produce concrete evidence to show: (1) there was a public safety hazard and/or negative secondary effect of a new gun store and (2) that the promoted regulation would address those public safety concerns. Citing out of context crime statistics is not justification for its actions towards Plaintiffs.

Plaintiffs have never claimed that gun stores are beyond regulation. And while Framing Era gun stores might have been subjected to gunpowder storage laws, *Heller*, 554 U.S. at 632, modern ammunition is stable, and gun stores are not generally regarded as extreme fire hazards. Indeed, a century before the Great Chicago Fire and Mrs. O'Leary's cow, gunpowder storage laws "required only that excess gunpowder be kept in a special container or on the top floor of the home." *Id.* at 632.

[2] This is also when the Defendant scrapped the indemnification requirement in Section 22-363(B)(2)(e) of the 2013 New Ordinance, which is why Plaintiffs are no longer pursuing a claim for injunctive relief as to it.

Therefore, the 2013 virtual ban on gun stores, which was allegedly a remedy for the 2011 blanket prohibition on gun stores, did not come close to meeting near-strict scrutiny. *See Ezell*, 651 F.3d at 708. Arguably, strict scrutiny should be applied here, as the 2013 New Ordinance was a *de facto* ban (*See*, *e.g.*, *Marzzarella*, 614 F.3d 85, and most recently *Binderup v. Attorney General of the United States*, 2016 U.S. App. LEXIS 16407 (3rd Cir. Sept. 7, 2016) (*en banc*) and *Tyler v. Hillsdale Cnty. Sheriff's Dept.*, 2016 U.S. App. Lexis 16880 (6th Cir. Sept. 15, 2016) (*en banc*).

Defendant has cited to *Peterson v. City of Florence, Minn.*, 727 F.3d 839 (8th Cir. 2013), but there are significant differences between this case and *Peterson*. There, the entire community was zoned residential, and there was no commercial or business uses allowed within the city limits. *Id.* at 842. The *Peterson* Court found that adult uses were not being targeted. *Id.* Here, it is obvious that gun stores were being targeted, which means it was Plaintiffs specifically at which the Defendant was directing its legislation. And while *Peterson* suggests that there may be an open question as to zoning a First Amendment business out of existence so long as it can be practiced in neighboring communities, *Ezell* has made clear that is forbidden in the Second Amendment context, at least in this Circuit. 651 F.3d at 697 ("This reasoning assumes that the harm to a constitutional right is measured by the extent to which it can be exercised in another jurisdiction. That's a profoundly mistaken assumption."); *See also Illinois Retailers*, 961 F.Supp.2d at 938-39.

Defendant cites to interests like crime prevention and public safety, but there is no evidence that forcing gun stores to keep distances from other businesses, or placing them in B-3 zones, would have achieved those interests. Defendant seems to be suggesting that a criminal was planning to buy a firearm from Plaintiffs, unwrap it in the parking lot, and then go commit mayhem at the local school. For a business that is so strictly regulated, with its customers so vetted, this is a preposterous notion. It is further unfairly insulting and generalizing to Plaintiffs that they would sell to anyone improperly or illegally. Kole made it clear that if he felt uncomfortable making a transaction, even if the customer passed the background checks, then Kole would refuse to make the sale.

And while Defendant cites to the normally-unquestionable public interests of safety and crime prevention as justifications for its actions (unjustified as they actually were), the timing of the revisions to the Weapons Dealer Ordinance, coming as they did right before Court rulings were to be announced, reveals that the impetus for the 2013 New Ordinance and the 2014 Ordinance was not any public interest, but to avoid an adverse Court ruling. The Defendant knew very well that its 2011 Revised Ordinance and 2013 New Ordinance were unconstitutional, and that is why they were amended.

Indeed, if the claimed public interests were the reason for the revisions to the Ordinance, then the revisions would have been stricter instead of more permissive to Plaintiffs.

Therefore, just as Defendants' 2011 ban on weapons dealers that attempted to explicitly run Plaintiffs out of business was impermissible to this Court, so too should be the 2013 Ordinance, which tacitly attempted to run Plaintiffs out of business by not allowing Plaintiffs any business location. The 2013 Ordinance amounted to a functional ban and was therefore unconstitutional, whether from the perspective of Plaintiffs or their customers. Though it is too late for injunctive relief, Plaintiffs suffered damages resulting from the Village's unconstitutional conduct, and their Motion for summary judgment should be granted.

VI. THE AGREEMENT, AND THE 2011 AND 2013 ORDINANCES, VIOLATED THE DORMANT COMMERCE CLAUSE.

Under the Dormant Commerce Clause, state and local laws are generally analyzed under a two-tier approach. First it is determined whether the law "regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce." *Oregon Waste Sys., Inc. v. Dept of Envtl. Quality*, 511 U.S. 93, 99 (1994) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)).

Defendant argues there is no burden show on interstate commerce, but the very nature of Plaintiffs' business involved the interstate transfer of firearms (*See* Plaintiffs' Exh.20 (Dkt. # 199-10); *See also* http://www.billhicksco.com/storefrontCommerce/redirect.do?page=zcontact ("Bill Hicks & Co., Ltd. is a national sporting goods distributor")).

Nevertheless, Plaintiffs are not alleging the gun store bans of the Agreement, 2011 Ordinance, and 2013 Ordinance discriminated against interstate commerce.

However, the bans did unconstitutionally burden interstate commerce with no legitimate local purpose. Applying the balancing test from *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), as discussed more fully in Plaintiffs' earlier summary judgment filings, Plaintiffs have met the burden of showing a violation of the Dormant Commerce Clause.

Plaintiffs do not dismiss "public safety" and "crime reduction" as important governmental interests, but those words cannot be used by themselves as a talisman to justify the infringing of a constitutional right. The City of Chicago offered much the same justifications in *Illinois Retailers*, and the Court in that case rejected them all, saying that banning gun sales in Chicago would not reduce these concerns. "In sum, given the rigorous showing that *Ezell* demands, the City has not demonstrated that allowing gun sales and transfers within city limits creates such genuine and serious risks to public safety that flatly prohibiting them is justified." *Illinois Retailers*, 961 F.Supp.2d at 946. That Court further stated: "If the City is concerned about reducing criminal access to firearms, either through legitimate retail transactions or via thefts from gun stores, it may enact more appropriately tailored measures." *Id.* at 946-47.

Instead, Defendant tailored measures so that Plaintiffs went out of business, which is what Defendant wanted all along. Therefore, Plaintiffs' Motion for summary judgment as to their dormant commerce clause claim should be granted.

VII. THE AGREEMENT VIOLATED PLAINTIFFS' FIRST AMENDMENT RIGHTS BY PROHIBITING PLAINTIFFS FROM DISPLAYING EXTERIOR SIGNANGE.

Despite the typo in the Procedural Background section of their original Memorandum (Dkt. # 206, p.2), Plaintiffs are moving for summary judgment on Count IV (First Amendment freedom of speech) of their pending Third Amended Complaint (Dkt. # 115). However, Plaintiffs are only seeking summary judgment as to the exterior sign prohibition, and not as to the weapon display prohibition. With that clarified, Plaintiffs assert the following:

Plaintiffs have discussed in previous briefs how the exterior sign ban in the Agreement did not satisfy the four-part *Central Hudson* test and was therefore unconstitutional. And Plaintiffs have shown how the Lease between Plaintiffs and the landlord Carlson allowed for exterior signage with Carlson's permission (See Def's Exh. 5 at p.2). Therefore, Defendant's claim the exterior ban was self-imposed is simply not true.

The advertising ban in the Agreement was an unconstitutional restriction upon Plaintiffs' First Amendment rights. Though it is too late for equitable relief to be of help, Plaintiffs should be awarded summary judgment, and should have the opportunity to prove their damages.

VIII. PLAINTIFFS' RETALIATION CLAIMS ARE MERITORIOUS FOR THE SAME REASONS AS THEIR RELATED CLAIMS.

Plaintiffs have proven the elements of their retaliation claim, namely: "that they engaged in constitutionally protected activity, that they suffered a deprivation that would likely deter protected activity in the future, and a causal connection between the two." *Kole*, 941 F.Supp.2d at 954 (citing *Watkins v. Kasper*, 599 F.3d 791, 794 (7th Cir. 2010)).

Plaintiffs have shown that Defendant had a permissive Weapons Dealer Ordinance on the books since at least 1972, commensurate with the legal nature of the business, even if it was prior to *Heller*. This Ordinance had lain dormant until Plaintiffs came along and actually asked for a Weapons Dealer license. Not knowing what to do (as Village Attorney Chester told Kole the Village officials were worried about their political careers (SUF 10)), they forced Kole to sign the Agreement and "agree" to its terms. Though the e-mails may give the appearance that Kole was willing, the facts are he had already signed a Lease (SUF 6), and Defendant was wrongfully holding up Plaintiffs' FFL inspection with the ATF (SUF 11).

Then, after forcing Plaintiffs to sign the Agreement (or face going out of business before even opening), the Defendant passed the 2011 Revised Ordinance to make sure they would only have to put up with Plaintiffs for a couple of years. It was only by pursuing this litigation that Plaintiffs were able to hold off the application of the Revised Ordinance, until the Defendant in turn scrapped it for the 2013 New Ordinance, which caused its own problems seeing as it in actuality left no place for Plaintiffs to operate. These facts display the hostility to Plaintiffs' business required for a retaliation claim (*See*, *e.g.*, *Woodruff v. Mason*, 542 F.3d 545, 552 (7th Cir. 2008).

But it is clear that from 2010 until 2013 the Defendant was actively seeking to minimize Plaintiffs' constitutionally protected business until it could get rid of Plaintiffs' business altogether. Per *Heller*, *McDonald*, and *Illinois Retailers*, Plaintiffs' firearm sales business was protected under the Second Amendment, and advertising that business was protected under the First Amendment[3], for which Defendant's actions are not even close to justified under near-strict scrutiny. In the alternative, the substantive due process clause of the Fourteenth Amendment protected Plaintiffs' right to open and operate its business, which the Defendants unlawfully deterred.

Plaintiffs agree that the retaliation claims of Counts VI and VII are tied to the Second Amendment, First Amendment, and Fourteenth Amendment substantive due process claims of Counts I, II, and IV. *See Kole*, 941 F. Supp. 2d at 954. These claims are slightly more specific, dealing with the Defendant's motive. And while an ordinance which violates the Constitution can have good motives (which does not excuse the constitutional violation), in this case the Defendant acted out of animus and for political cover, solely because of the nature of Plaintiffs' business, and Plaintiffs suffered damages as a result. While commercial speech may be afforded less protection than, say, political speech, it certainly is afforded more protection than the prisoner threats that were rejected in *Watkins*.

[3] Plaintiffs are not seeking summary judgment for any claim regarding the display of firearms, pursuant to the Court's prior ruling on the issue. *Kole*, 941 F.Supp.2d at 952.

And while Plaintiffs will of course not be seeking a double recovery for their damages, the facts of the Defendant's statements and actions mean that Plaintiffs' Motion for Summary Judgment as to Counts VI and VII must be granted.

CONCLUSION

WHEREFORE, the Plaintiffs, Tony Kole and Ghost Industries, LLC, an Illinois limited liability company, requests this Honorable Court to grant their F.R.Civ.P. 56(a) Motion for Summary Judgment, as well as any and all further relief as this Court deems just and proper.

Dated: November 28, 2016 Respectfully submitted,

By: /s/ David G. Sigale
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CERTIFICATE OF ATTORNEY AND NOTICE OF ELECTRONIC FILING

The undersigned certifies that:

1. On November 28, 2016, the foregoing document was electronically filed with the District Court Clerk via CM/ECF filing system;

2. Pursuant to F.R.Civ.P. 5, the undersigned certifies that, to his best information and belief, there are no non-CMJECF participants in this matter.

/s/ David G. Sigale
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